

Crown Employees
**Grievance Settlement
Board**

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GSB# 1998-1368
UNION# 98D003

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Alcock)

Grievor

- and -

The Crown in Right of Ontario
(Ministry of Public Safety and Security)

Employer

BEFORE

Ken Petryshen

Vice-Chair

FOR THE UNION

Ed Holmes
Ryder Wright Blair & Doyle
Barristers and Solicitors

FOR THE EMPLOYER

Christopher Jodhan
Counsel, Management Board Secretariat

Kate Karn
Staff Relations Officer, Ministry of Public
Safety and Security

HEARING

July 9, December 13, December 14, 2001;
July 24 and July 25, 2002.

DECISION

In a grievance dated October 19, 1998, Mr. Neil Alcock complains that he had not been provided with his new job description. Effective July 8, 1998, the Employer had permanently reassigned Mr. Alcock to a newly created Security Officer 2 (“SO2”) position at the Kenora Jail. Prior to the reassignment he had been classified as a Correctional Officer 2 (“CO”), occupying the position of General Duty Officer. During the first day of hearing, counsel for the Employer raised an issue about the form of the grievance, but by the second day of hearing the parties had resolved that issue. They did so by agreeing to treat Mr. Alcock’s grievance as alleging that the Employer had failed to properly accommodate his disability when it reassigned him to the SO2 position, thereby reducing his rate of pay. The Union takes the position that this conduct by the Employer contravenes the Ontario *Human Rights Code* (“the *HRC*”), as well as Article 2, the management’s rights provision, and Article 3, a no discrimination clause, of the Collective Agreement. In submitting that it did not contravene the Collective Agreement or the *HRC*, the Employer takes the position that it did not fail to properly accommodate Mr. Alcock and that by assigning him to the SO2 position it went beyond its legal obligation. The Employer also argues that the grievance before me is, in essence, a classification grievance and, accordingly, a matter over which I have no jurisdiction.

Mr. Alcock testified for the Union and Ms. K. King, Superintendent at the Kenora Jail, testified on behalf of the Employer. Ms. King commenced her employment at the Kenora Jail as a Deputy Superintendent in 1998, and became Superintendent of that institution

in October 2000. Although there was little dispute on the facts, the parties have significantly different views on what legal conclusions flow from the facts giving rise to the grievance.

Mr. Alcock commenced his employment at the Kenora Jail on December 17, 1986, and in October 1988 he attained the status of a CO2. In February 1992, Mr. Alcock was in a motor vehicle accident, sustaining a spinal injury. Apart from a brief return, he was off work due to his injury until November 1992, when he returned to work and was assigned to the control module. While at work in May 1993, Mr. Alcock exacerbated his pre-existing condition when his head struck a doorway. During the ensuing absence Mr. Alcock received STD and LTIP benefits and did not return to work until November 13, 1995. When he returned at that time he entered into the first of a series of Rehabilitation Employment Agreements, in accordance with Article 42.7 of the Collective Agreement, a provision which deals with employees receiving LTIP benefits. Each such agreement sets out a number of terms, including Mr. Alcock's hours per week and the duties he would perform. This process was intended to assist Mr. Alcock in becoming a full time employee. He initially began working 20 hours per week and by late 1997 he had gradually increased his hours to 40 per week. Upon his return in November 1995, Mr. Alcock was again assigned to the control module. His last Rehabilitation Employment Agreement expired on October 30, 1997, and his LTIP benefits ceased as of November 15, 1997. The Employer extended the 24 month Rehabilitation Date to January 15, 1998.

In February 1997, the then Superintendent requested Mr. Alcock provide the Employer with a medical prognosis and an indication of the anticipated duration of further accommodation. In a response dated April 29, 1997, Dr. Beveridge indicated that Mr. Alcock

“has not had any measurable or sustained improvement in his neck, shoulder and arm pain for the last several years, and therefore, his prognosis for complete recovery is guarded.” He also indicated that Mr. Alcock “is indefinitely partially disabled and will require some job modifications...” During the latter part of 1997, the Employer requested Mr. Alcock to provide a medical assessment of his ability to perform the essential duties of a CO and a proposed SO2 position. In a handwritten note dated November 13, 1997, Mr. Alcock provided the Employer with an outline of the duties he performed in the control module.

In a letter dated January 27, 1998, the Deputy Superintendent at the Kenora Jail wrote to Mr. Alcock as follows:

On December 10, 1997, you were requested to obtain a prognosis from your physician as to when you could resume the full duties of a Correctional Officer. Your physician has written the Kenora Jail that due to your neck injury resulting from your motor vehicle accident, it is not safe for you to work at the full level of a Correctional Officer and that any improvement in your medical condition will be subtle and gradual over the next few years.

Please be advised that as you will not be able to perform the full duties of a Correctional Officer in the near future you are being assigned, effective January 19, 1998, to a Security Officer position working full time on shifts, in the Control Module due to health reasons. This is in accordance with Article 7.5 of the OPSEU Collective Agreement.

As per the above noted article, you shall receive your current salary for 6 months. After 6 months, if you cannot perform the full duties of a Correctional Officer, you will be assigned permanently to the Security Officer 2 classification which is situated in the Administrative Bargaining Unit. Your salary will be \$17.00 per hour.

You are to provide documentation from your physician indicating whether or not you can perform the full duties of a Correctional Officer on July 10, 1998.

If you have any questions please advise.

In a letter to the Deputy Superintendent dated July 7, 1998, shortly before the time Mr. Alcock was to be permanently assigned to the SO2 position, Dr. Beveridge wrote to the Employer as follows:

I have elected to answer in narrative form your request for Functional Health Information on your employee Neil Alcock. I have read both of his job descriptions i.e. that of Correction Officer 2 and that of Security Officer. I have reviewed Health Information on Mr. Alcock over the last five years or more since his motor vehicle accident in which he injured his neck. It is my opinion because of ongoing symptoms that for physical reasons it would not be safe for him to be working as a Correctional Officer given the job description. This is based on his neck pain and his functional disability in his neck, arm, and shoulders, which preclude him doing several physical aspects of the Correctional Officer 2 job.

I reviewed the job description of a Security Officer and I feel that by in large even with his neck disability, this employee could do all of the tasks listed for this position. I do note that as the day wears on, because of fatigue and increasing pain and increasing weakness in the neck and shoulder muscles, that he simply can't tolerate a 12 hour shift. He still relies heavily on physiotherapy for treatment for his neck condition, and usually after 8 hours of work, he needs physio attention. I am recommending to you and your department that Mr. Alcock work 8 hour shifts and I feel confident he could do the job description as described for Security Officer.

With regard to prognosis for the future, I would think it would be reasonable that the status of his neck injury and neck disability be reassessed on approximately a 6 to 12 month basis. I am personally optimistic that in the long run his medical condition can and will still improve. Certainly, he is physically functionally at a higher level now than he was several years ago. Any improvement in the future will be subtle and gradual, however, over the next several years, I still expect a favourable outcome to his health problem.

I trust this is the information you require. Please don't hesitate to contact me by phone if there are other questions that need to be addressed.

Having regard to Dr. Beveridge's assessment, Mr. Alcock was permanently assigned to the SO2 position, located in the Administrative Bargaining Unit, at a wage rate of \$17.00 per hour, effective July 8, 1998. As a CO in the Corrections Bargaining Unit Mr. Alcock was paid

\$21.39 per hour. As an SO2 Mr. Alcock continues to work a 7 a.m. to 3 p.m. shift, Monday to Friday, for a 40 hour workweek in the control module.

There is no dispute that Mr. Alcock has a permanent disability which precludes him from working in direct contact with inmates. Any direct contact with inmates could potentially lead to a physical altercation which might result in further injury to his neck. Prior to the hearing of this grievance Mr. Alcock did not object to only being assigned control module duties and there is no indication that other assignments were considered or discussed. During his testimony, Mr. Alcock suggested that, with modifications, he could perform duties at other posts, such as Admitting and Discharge. Although counsel for the Union did not focus on this aspect of the evidence during his submissions, it is my conclusion that Mr. Alcock could not perform CO duties at other posts. It would be impossible to modify the duties at other posts to entirely avoid the possibility of direct inmate contact. The likely explanation for the absence of any discussion or consideration of other duties is because of the recognition, even by Mr. Alcock, that the control module duties are the only duties he can perform, given his medical restriction.

The Correctional Officer Series provides that COs perform a variety of functions related to the care, custody and control of inmates and that they can be assigned to various functional areas of the institution. The class standard indicates that a CO's duties are usually performed on a rotational shift basis. The job description of the General Duty Officer position at the Kenora Jail sets out a number of duties, most of which involve direct contact with inmates. These duties include processing offenders on admission and discharge, searching

inmates, escorting inmates and directly supervising inmates. Under the heading of Disagreeable and Hazardous Working Conditions, a CO job description and evaluation form refers to the following matters:

Job requires continuous interaction with the full range of offenders whose behaviour can be unpredictable creating a working environment where a range of injuries or harm could occur (e.g. sprains, strains, bruises, scrapes, broken limb, loss of consciousness). Job requires working outdoors during shift (e.g. exposure to heat and cold). Job requires carrying out strip/frisk searches of offenders during shift to ensure contraband (e.g. weapons, drugs) is not present. Job requires exposure to the risk of infectious/communicable diseases and/or conditions (e.g. Hepatitis B and HIV).

The control module is an integral part of the operation of a correctional facility. It operates 24 hours a day, 7 days a week, and is off limits to inmates. This functional area is staffed by one officer at a time and is the only secure area at the Kenora Jail. At the Kenora Jail CO's rotate through the control module. During the course of a shift, a CO is usually assigned no more than 2 hours, and at the most 4 hours, in the control module.

Mr. Alcock is able to perform all of the duties associated with the control module. In other words, the control module duties he performs are the same duties performed by anyone assigned to that post. For our purposes it is unnecessary to detail all of the control module duties. Suffice it to say that these duties include issuing keys to staff, answering the telephone and directing calls, maintaining radio communication with radio posts, supervising inmate visits from the control module, observing segregation cells by means of video cameras and operating electric doors to and from various areas of the institution.

Superintendent Kinger testified that the essential feature of the duties of a CO is dealing directly with inmates and that it is this daily interaction which subjects an officer to risk of injury. She testified that control module duties constitute approximately 10% of the duties of a CO. I take this to mean that since CO duties are usually assigned on a rotational basis, a CO would usually spend no more than approximately 10% of their time performing control module duties. The absence of direct inmate contact means that the usual risks assumed by COs are not present with such an assignment. If Mr. Alcock is on a break or lunch when a panic alarm is activated, he is required to immediately return to the control module. Ms. Kinger also testified that the reason for the rotation in the control module is because the duties performed in that functional area represent a small component of the care, custody and control functions of a CO. She indicated that in an effort to meet its obligation to accommodate an employee the Employer would often assign a CO to the control module for an entire shift for a period of time until the CO can return to his or her usual duties. Ms. Kinger testified that in the case of Mr. Alcock the Employer accommodated him by assigning him control module duties and continued to pay him at the CO rate of pay. During her cross-examination, Ms. Kinger agreed that there was no undue hardship for the Employer in giving Mr. Alcock such an assignment. It was only when it received medical confirmation that it was unlikely that Mr. Alcock would be able to return to perform the full duties of a CO that that the Employer created the SO2 position at the Kenora Jail and assigned him to that position.

The class standard for the SO2 position indicates that the position involves providing security services from an assigned post in a government facility. The position specification for the SO2 position at the Kenora Jail sets out the majority of the duties performed by an officer

in the control module. During his cross-examination, Mr. Alcock acknowledged that he performs 90% of the duties contained in the position specification for the SO2 position at the Kenora Jail. It appears that these duties were essentially adopted from the list of duties dated November 13, 1997, prepared by Mr. Alcock. Ms. Kinger testified that an SO2 position exists at the Millbrook Correctional Centre in a detention wing control module. The SO2 position created for Mr. Alcock appears to be the first such position in a central control module.

Prior to his disability, Mr. Alcock worked as a CO in the control module on a rotational basis, just like other COs. Between his return to work in November 1995 until July 1998, he was being accommodated with a control module assignment where he only performed control module duties and was paid the CO rate. Once he was assigned to the SO2 position, at a lower rate of pay, Mr. Alcock continued to perform the same control module duties. Since November 1995, when Mr. Alcock was not at work, the control module duties continued to be performed by COs on a rotational basis as previously described.

As it indicated in the letter to Mr. Alcock dated January 27, 1998, the Employer assigned Mr. Alcock to the SO2 position in the control module due to health reasons and in so doing relied on Article 7.5 of the Collective Agreement. This provision provides as follows:

7.5 Where, for reasons of health, an employee is assigned to a position in a classification having a lower maximum salary, he or she shall not receive any salary progression or salary decrease for a period of six (6) months after his or her assignment, and if at the end of that period, he or she is unable to accept employment in his or her former classification, he or she shall be assigned to a classification consistent with his or her condition.

Article 7.5 is contained within a pay administration provision. It confirms the Employer's right to assign an employee to a classification consistent with his or her condition if the employee is unable to accept employment in his or her former classification due to health reasons. In their submissions as to whether the assignment of Mr. Alcock in these circumstances to the SO2 position contravenes the Collective Agreement or the *HRC*, both counsel recognized that such an assignment could not be made for health reasons unless Mr. Alcock is unable to perform the job of a CO. The main focus of the dispute between the parties is on the appropriate way to characterize the control module duties in the context of the CO classification. In dealing with this aspect of the dispute counsel made submissions on the issue of the Employer's obligation to accommodate Mr. Alcock, having regard to his disability.

The essence of the Union's position is that control module duties are the duties of a CO and that an employee performing such duties is entitled to be paid the CO rate. Counsel emphasized that the control module is a functional area of work which has been historically assigned to COs. In the Union's view, the Employer properly accommodated Mr. Alcock by removing scheduling barriers and permanently assigning him to the control module, thereby modifying the CO position. Counsel submitted that the duty to accommodate is an ongoing obligation which in this instance requires the Employer to continue to assign Mr. Alcock the control module duties and to pay him the CO rate because to do so causes the Employer no undue hardship. Counsel argued that the management right reflected in Article 7.5 does not apply in this case because the Employer cannot assign an employee to a different classification when the employee, in this case Mr. Alcock, is performing the duties of his classification, with modifications. Counsel submitted that the control module duties performed by Mr. Alcock as

an SO2 should not be treated as the duties of a different classification since they clearly are duties of the CO classification. Counsel argued that the Employer created the SO2 position and assigned Mr. Alcock to the position solely because of his disability, contrary to the *HRC* and the Collective Agreement. Counsel submitted that the Security Officer Classification Series does not capture Mr. Alcock's duties, which is further support for the proposition that the control module duties best fall within the Correctional Officer Classification Series.

Although conceding that the Employer has a general management right to create an SO2 position at the Kenora Jail, counsel argued that this right was exercised inappropriately in this instance. The Union takes the position that it unreasonable and contrary to the management rights provision to have Mr. Alcock perform the control module duties at a lower rate of pay when he had performed these duties in the past and COs continue to perform them while enjoying the CO rate. The Union referred me to the following decisions: *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.* (1999), 176 D.L.R. (4th) 1 (SCC); *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (1999), 181 D.L.R. (4th) 385 (SCC); *Re Riverdale Hospital and C.U.P.E., Loc. 79* (1994), 41 L.A.C. (4th) 24 (Knopf); *Re Calgary District Hospital Group and U.N.A., Local 121-R* (1984) 41 L.A.C. (4th) 319 (Ponak); *Re Mount Sinai Hospital and O.N.A.* (1996), 54 L.A.C. (4th) 261 (R. Brown); *Re Greater Niagara General Hospital and O.N.A.* (1995), 50 L.A.C. (4th) 34 (H. Brown).

The essence of the Employer's position is that Mr. Alcock cannot perform the essential duties of the CO position, even with accommodation. The Employer maintains that it accommodated Mr. Alcock by assigning him the control module duties with the hope that this

